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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, grant a federal district court jurisdiction to review the judgment of a state court that a prior federal judgment does not bar a pending state court action?

2. Is the Anti-Injunction Act, 28 U.S.C. §2283, an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that a federal district court need not give full faith and credit to a state court judgment that a prior federal judgment does not bar a pending state court action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

4. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

5. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

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OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 and appears as Appendix A hereto; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 3, 1984. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed and was denied on January 14, 1985. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be...deprived of life, liberty, or property, without due process of law;...

Federal Full Faith And Credit Act, 28 U.S.C. §1738

The judicial proceedings of any court of such State...shall have the same full faith in credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ....

Anti-Injunction Act, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank of Montgomery, N.A. (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, *Parsons Steel Industries, Inc., v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-179-G, (hereinafter "State Action"). The State Action alleged that loans made to Parsons Steel Industries, Inc. by Bank were forced into default and foreclosed through the actions of Bank, Herbert, Orange and OSI, Inc. The State Action

alleged against Bank false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. (Def.Ex.10). Additional claims including fraud and conversion were made against Orange and OSI. (R.50-53)

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt (R.281). *In Re: Parsons Steel Industries, Inc., a Bankrupt, Bankruptcy Number 79-173-N.* A. Pope Gordon was appointed Trustee[1] and eventually succeeded to Parsons Steel Industries' interest in the State Action on motion of Bank. (Def.Ex.3).

On May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action"). Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI were Defendants. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since that corporation had been adjudicated a bankrupt and a Trustee appointed..

The Federal Action alleged only that Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the Bank Holding Company Act (hereinafter "BHCA") 12 U.S.C. §1972. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since the damages sought were solely on behalf of Parsons-Montgomery.

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[1] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.)

The district court repeatedly rejected that contention. Bank did not, however, seek to have the Trustee joined as a party to the Federal Action. The district court ordered the issue of liability tried separate from the issue of damages, (R.269) and after a jury verdict in Plaintiffs' favor (R.278) granted Bank's motion for judgment notwithstanding the verdict. The United States Court of Appeals for the Eleventh Circuit affirmed holding that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242 (11th Cir. 1982).

Bank plead the federal judgment in the State Action and presented its res judicata defense by motion for summary judgment. That motion was denied. (Def.Ex.4). The judge assigned to the case later recused himself and Bank presented its res judicata defense by motion (Def.Ex.11) to a second state court judge who also ruled that the federal judgment did not bar the State Action. (Def.Ex.20).

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of numerous affirmative defenses including waiver, consent, estoppel and res judicata. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of Parsons in the amount of $2,000,000.00. (Def.Ex.22). The trial court entered a final judgment on the jury verdict. Bank moved for judgment Notwithstanding the verdict and for new trial. (R.94)

Prior to a decision on their post-trial motion Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from collecting the judgment entered in the State Action. Bank's request for injunctive relief was premised on the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, and its contention - previously rejected by the state court - that the judgment in the Federal Action precluded the State Action. (R.1)

The district court in an unprecedented decision entered judgment in favor of Bank and enjoined Petitioners from further prosecution of the State Action. (R.301-316) (Appendix B). The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action. (R.303, Appendix B p. A-32). The district court refused to give full faith and credit to the state court's decision on the res judicata issue. The district court also enjoined the Trustee for Parsons-Montgomery although he had not been a party to the Federal Action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action.

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984) (Appendix A). The majority held that the Anti-Injunction Act, 22 U.S.C. §2283 was an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court's determination that the judgment in the Federal Action did not preclude the State Action.[2] The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but arguably "could have been" litigated in the Federal Action even though Bank awaited a decision by the state court before seeking the injunction. 747 F.2d at ____. (Appendix A p. A-1). The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to his fraud claim but remanded to the district court to determine whether virtual representation existed as to

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[2] Not only does the majority opinion represent the first occasion on which the Anti-Injunction Act has been held to be an exception to the Full Faith and Credit Act, it represents the first implied exception to the Act *any court* has found.

Trustee's UCC claim. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Act did not implicitly amend the Federal Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court's determination that res judicata did not apply. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the earlier federal judgment. In addition, Bank awaited a judgment on the merit in state court before requesting an injunction which further "complicates the relations between state and federal courts. 747 F.2d at ____. (Appendix A p. A-29).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Raises Questions Of Federal-State Relations Of Critical Importance Which Must Be Settled By This Court.

The dissenting Judge in the Court of Appeals noted:

> This case presents a thorny problem of federal and state court relations. The law in the area appears relatively unclear, and, with regard to many of the issues addressed in the majority's opinion, the Supreme Court has yet to afford us guidance. Indeed, the Supreme Court may choose to use this case to set forth more definite standards.[3]

The dissenting Judge's position is well taken. Few issues have reached this Court more often than the propriety of a federal injunction of an ongoing state court proceeding.[4] Ultimately this Court must resolve conflicts between co-existing independent court systems.

In *Huffman v. Pursue Limited,* 420 U.S. 592, 43 L.Ed 2d 482, 95 S.Ct. 1200 (1975), Justice Rehnquist, writing for a six member majority, pinpointed the "relevant consideration of federalism" which make this issue so critically important:

> Interference with a state judicial proceeding prevents the state...from effectuating its substantive policies, ...from

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[3] *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d at ____ Appendix A PageA-26.

[4] *See: Younger v. Harris,* 401 U.S. 37, 27 L.Ed 2d 669, 91 S.Ct. 746 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed 2d 22, 85 S.Ct. 1116 (1965); *Lynch v. Household Finance Corporation,* 405 U.S. 538, 31 L.Ed 2d 424, 92 S.Ct. 1113 (1972); *Steffel v. Thompson,* 415 U.S. 452, 39 L.Ed 2d 505, 94 S.Ct. 1209 (1974); other cases cited in footnote 7 herein.

> continuing to perform the separate function of providing a forum competent to indicate any constitutional objections interposed against those policies... results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."

420 U.S. at 604.

There can be no greater intrusion into a state court proceeding than occurred in this case. The district court's injunction was premised on its conclusion that an earlier federal judgment barred a pending state proceeding. Bank's request for an injunction came only after the state court spent nine days trying a variety of state law issues and determined that the prior federal judgment did not bar the state law claims. The district court made no finding that its unprecedented intrusion into a state court system was necessary to "protect or effectuate" its earlier judgment. In addition, the district court enjoined a state court litigant who was never a party to the Federal Action and whose only opportunity to fully litigate his interests came in state court.

In order to justify such an unprecedented intrusion into state court function, the Court of Appeals found it necessary to restrict the Anti-Injunction Act to an extent prohibited by this Court's decision in *Atlantic Coast Line;*[5] to find an implied exception to the Full Faith and Credit Act where none had been found before violating in principle this Court's decisions in *Allen v. McCurry,*[6] and *Kremer v. Chemical Construction Company;*[7] to expand the jurisdiction of federal district courts to

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[5] *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 26 L.Ed.2d 234, 90 S.Ch 1739 (1970).

[6] *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed 2d 308, 101 S.Ct. 411 (1980).

[7] *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 72 L.Ed 2d 262, 102 S.Ct. 1883 (1982).

allow appellate review of a state court decision in these circumstances; and to adopt a definition of virtual representation different from any other circuit. Each of these unprecedented actions raises questions of federal-state relations of critical importance which must be settled by this Court.

The district court's injunction was an unprecedented and unwarranted intrusion into state court function. This Court should grant certiorari "to consider the important question of the relationship between state and federal courts which such an injunction raises." *Vendo Company v. Lektro-vend Corporation,* 433 U.S. 623, 626, 53 L.Ed 2d 1009, 97 S.Ct. 2881 (1977) (Rehnquist, J.)

A. The Court Of Appeals Decision Violates Decisions Of This Court In Granting A Federal District Court Jurisdiction To Sit In Review Of A State Court Decision.

The Constitution of the United States, Article IV, Section 1 provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain or establish.

In establishing our federal court system Congress granted limited original jurisdiction to district courts[8] and limited appellate jurisdiction to courts of appeal.[9]

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have been not given such powers since that time. Only the supreme court was authorized to review on direct appeal the decision of state courts.

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[8] *See:* 28 U.S.C. §§1330-1363.

[9] *See:* 28 U.S.C. §§1291-1294.

Atlantic Coast Line, 398 U.S. at 286.

This Court has on more than one occasion upheld its exclusive jurisdiction to sit in appellate review of state court decisions. In *Rooker v. Fidelity Trust Company,* 263 U.S. 413, 68 L.Ed 362, 44 S.Ct. 149 (1923) the losing party in a state court action sued in federal district court to have the state judgment set aside alleging a denial of due process of law. The district court dismissed for lack of jurisdiction and this court affirmed:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment....To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

263 U.S. at 416.[10] This Court further emphasized that if the constitutional questions actually arose in the state court proceeding it was the duty of the state court to decide them.

> If the decision was wrong, that did not make the judgment void, but merely left it open to reversal on modification in an appropriate and timely appellate proceeding.

263 U.S. at 415.

That the district court exceeded its jurisdiction and violated this Court's decision in *Rooker* cannot be denied. Bank submitted its contention that the prior federal judgment precluded the State Action to the state court. The state court considered that issue both in pretrial motions and at trial. A final judgment was entered rejecting that defense. At the time it sought the federal injunction Bank had submitted the issue again to the state court

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[10]Similarly in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 75 L.Ed 2d 206, 103 S.Ct. 1303 (1983) this Court held that the United States District Court for the District of Columbia had no jurisdiction to review proceedings of the District of Columbia Court of Appeals in a bar admission matter.

in post-trial motions. The district court was able to grant the injunction only by reconsidering Bank's res judicata defense previously rejected by the state court. To do so was an unauthorized exercise of appellate jurisdiction.

Important policy considerations underlie Congress's decision to grant *only* this court authority to review state court judgments. Since this Court will review such judgments only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition this Court, the highest court of the land, can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism.

This Court should grant certiorari to consider this important question of federal jurisdiction. The lower courts have interpreted 28 U.S.C. §2283 in a manner to undermine this Court's exclusive jurisdiction to review state court judgments.

B. The Court Of Appeals Decision Violates In Principle Decisions Of This Court By Recognizing The Anti-Injunction Act As An Implied Exception To The Federal Full Faith And Credit Act.

The lower courts refused to give full faith and credit to the state court's determination that the federal judgment did not bar the pending State Action. The res judicata issue was presented by Bank as an affirmative defense and a decision on that issue was absolutely necessary to the final judgment rendered by the state court. The Court of Appeals upheld the district court by holding that the Anti-Injunction Act, 28 U.S.C. §2283, is an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738. That holding contravenes in principle established precedent of this Court.

At the foundation of our federal system is Constitution of the United States, Article IV, §1:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Our forefathers found that principle so important that one of the first acts of Congress was the passage of the Federal Full Faith and Credit Act. Act of May 26, 1790, Ch. 11, 1 Stat. 122. The Act, now codified as 28 U.S.C. §1738, provides in pertinent part:

> The judicial proceedings of any court of such state...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...

This Court has granted certiorari on a number of occasions to consider §1738 and has consistently held that §1738 requires federal courts to apply res judicata and collateral estoppel to issues decided by state courts.[11] When a state court has first adjudicated an issue the application of collateral estoppel serves to "promote the comity between state and federal court that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. at 96.

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[11] *Angel v. Bullington,* 330 U.S. 183, 91 L.Ed 832, 67 S.Ct. 657 (1947); *Montana v. United States,* 440 U.S. 147, 59 L.Ed 2d 210, 99 S.Ct. 970 (1979); *Brown v. Felsen,* 442 U.S. 127, 60 L.Ed 2d 767, 99 S.Ct. 2205 (1979); *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed 2d 308, 101 S.Ct. 411 (1980); *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 72 L.Ed 2d 262, 102 S.Ct. 1883 (1982); *Haring v. Prosise,* ____ U.S. ____, 76 L.Ed 2d 595, 103 S.Ct. 2368 (1983); *Migra v. Warren City School District,* ____ U.S. ____, 79 L.Ed 2d 56, 104 S.Ct. 892 (1984).

This Court has made it quite clear that an exception to §1738 can be recognized *only* where a later statute contains an express or implied partial repeal. *Allen v. McCurry, Kremer v. Chemical Construction Corp.* The Federal Full Faith and Credit Act is so fundamental to our federal system that prior to the decision in this case authorization for a federal court to re-examine state court findings had been found *only* in the Federal Habeas Corpus Act which expressly provides for review in certain limited circumstances. *See:* 28 U.S.C. §2254. No court had found an implied exception.

In *Kremer v. Chemical Construction Corp.*, this Court reaffirmed the cardinal principle that repeals by implication are not favored and taught that whenever possible statutes must be read consistently. A repeal by implication may be recognized:

> (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one;...But,...the intention of the legislature to repeal must be clear and manifest...(citations omitted).

456 U.S. at 468.

The Court of Appeals in this case completely disregarded a simple method of reading these two statutes consistently. Judge Hill, in dissent, articulated that method:

> I would conclude that Section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed the res judicata issue on the merits. In cases in which the state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state courts resolution of the issue.

747 F.2d at ____, App. A p. A-27.

The lack of any direct incompatibility between §2283 and §1738 is alone sufficient to negate an implied repeal. *Kremer v. Chemical Construction Company,* 456 U.S. at 470. Neither does the purpose of passing the Anti-Injunction Act suggest any "clear and manifest" intention to repeal.

The passage of the most recent version of the Anti-Injunction Act was intended to abrogate this Court's decision in *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 86 L.Ed. 100, 62 S.Ct. 139 (1941) which held that federal courts were without power to enjoin state courts from relitigating issues the federal court had already finally adjudicated. The exception "to protect or effectuate its judgment" allows the action forbidden by *Toucey.* Nothing in the legislative history suggests that Congress intended to allow a *federal court to relitigate* an issue which had previously been fully litigated in a state court - even if that issue is the preclusive effect of a prior federal judgment. The *Toucey* decision did not speak to that issue so it was not necessary for Congress to extend that power in order to overrule *Toucey.*

The Court of Appeals decision recognizing §2283 as an implied exception to §1738 contravenes in principle *Allen v. McCurry* and *Kremer v. Chemical Construction Corp.* Certiorari should be granted to reverse that error.

C. The Court Of Appeals Decision Violates This Court's Decision In *Atlantic Coast Line Railroad Company v. Brotherhood Of Locomotive Engineers* By Expanding Exceptions To The Anti-Injunction Act.

The Anti-Injunction Act,[12] 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The most important decision of this Court interpreting the Anti-Injunction Act is *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 26 L.Ed 2d 234, 90 S.Ct. 1739 (1970). The circumstances in *Atlantic Coast Line* are remarkably similar to this case. Atlantic Coast Line filed suit in federal court seeking to enjoin picketing at one of its switching yards. The federal district court denied the injunction. Later Atlantic Coast Line sought and obtained an injunction against the picketing in state court. After the state court judgment the union sought to have the federal court enjoin enforcement of that judgment contending that an injunction was necessary to protect the federal court's earlier decision denying the railroad an injunction against picketing. The

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[12] The Anti-Injunction Act plays such an important role in our federal system that this Court has granted certiorari to construe it on numerous occasions. *See: Oklahoma Packing Co. v. Oklahoma Gas and Electric Company,* 309 U.S. 4, 84 L.Ed 537, 60 S.Ct. 215 (1940); *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 86 L.Ed 100, 62 S.Ct. 139 (1941); *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 99 L.Ed 600, 75 S.Ct. 452, (1955);*Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed 2d 705, 92 S.Ct. 2151 (1972); *National Labor Relations Board v. Nash-Finch Company,* 404 U.S. 138, 30 L.Ed 2d 328, 92 S.Ct. 373 (1971); *Roudebush v. Hartke,* 405 U.S. 15, 31 L.Ed 2d 1, 92 S.Ct. 804 (1972); *Vendo Company v. Lektro-Vend Corporation,* 433 U.S. 623, 53 L.Ed 2d 1009, 97 S.Ct. 2881 (1977); *County of Imperial, California v. Munoz,* 449 U.S. 54, 66 L.Ed 2d 258, 101 S.Ct. 289 (1980).

district court issued the injunction and its decision was affirmed by the Court of Appeals. This Court granted certiorari and in reversing held that injunction was not necessary to "protect or effectuate" the earlier federal judgment because that judgment did not consider whether an injunction against picketing was available under state law.

Similarly in the instant case, as noted by both lower courts, the State Action involved issues which were *not resolved* in the earlier Federal Action. Ignoring this Court's decision in *Atlantic Coast Line,* the district court enjoined issues which were not, but in its opinion, "could have been" decided in the Federal Action.

In reaching its decision in *Atlantic Coast Line* this Court articulated several important policy considerations. First, since the prohibition against injunctions rest on the fundamental constitutional independence of state courts "the exception should not be enlarged by loose statutory construction." 398 U.S. at 287. The courts below ignored that teaching.

Second, "lower federal courts possess no power whatever to sit in direct review of state court decisions." 398 U.S. at 296. The courts below ignored that teaching. The district court here made no finding that an injunction was necessary to "protect or effectuate" its judgment but merely substituted its decision that the state action was precluded by the federal judgment for that of the state court. If the Bank "was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the [state] appellate courts and ultimately, if necessary in this court." *Atlantic Coast Line,* 398 U.S. at 296.

Third, because of the absolute prohibition of §2283 and the critical comity considerations involved "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S. at 297. The courts below ignored that teaching.

It is critical that this Court grant certiorari for another reason. The express prohibition of 28 U.S.C. §2283 "is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 514, 99 L.Ed 600, 75 S.Ct. 452 (1955). This case represents the most recent in a line of cases "whittling away" at that expressed prohibition.

In *Woods Exploration and Producing Company, Inc. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) the United States Court of Appeals for the Fifth Circuit held the relitigation exception applicable to authorize an injunction *any time* the state proceeding is precluded under the doctrine of res judicata. 438 F.2d at 1312. For the first time, a court required no showing that the injunction was necessary to "protect or effectuate" a prior federal judgment but instead approved an injunction of issues which were not but "could have been" litigated in the prior federal action. The expansion of the relitigation exception in *Woods Exploration* is arguably minor since the federal judgment had been in a federal anti-trust action and the state proceeding enjoined was a state anti-trust action. The issues in both cases although arising under different laws were substantively identical.

The United States Court of Appeals for the Seventh Circuit relying on *Woods Exploration* further expanded the relitigation exception in *Harper Plastics, Inc. v. Amoco Chemical Corporation,* 657 F.2d 939 (7th Cir. 1981). In *Harper* the state court defendant had previously obtained a federal jdugment that its actions related to distribution of plastic raw materials did not violate federal anti-trust laws. The plaintiff then filed a complaint in state court alleging the same facts but basing recovery on breach of contract under state law. The Seventh Circuit, citing *Woods,* held that the state law contract claim could have been joined with the earlier federal claim so that it was now within the district court's discretion to enjoin the state action.

In this case the lower courts relying in *Woods* and *Harper* have stretched the relitigation exception to the point of destroying the independent nature of state courts. The district court made no finding that its injunction was necessary to "protect or effectuate" its prior judgment and specifically recognized that the federal and state action involved different causes of action.[13] In addition the injunction extends to the Trustee whose only opportunity to fully and fairly adjudicate his claims came in state court.

Although *Woods* and *Harper* represent injunctions of doubtful necessity to "protect or effectuate" a prior federal judgment the injunctions in those cases were much less intrusive into state court function than the injunction in this case because they were issued in the early stages of the state court proceedings. Neither of the courts in those cases sat in direct review of a state court by resolving an issue which that court had previously resolved nor did those courts enjoin litigants who were not parties to the federal judgment and who had had no prior opportunity to litigate their claims.

This Court should grant certiorari to halt the "whittling away" of the express prohibition of §2283 which these cases represent.

II. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

At a minimum due process of law requires that a litigant be afforded the opportunity to present evidence and argument in support of his claims. *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 329, 28 L.ed 2d 788, ____, 91 S.Ct. 1434, 1443 (1971). Consequently, one is not bound by

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[13] "A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit." (Appendix B. p. A-32)

a judgment in litigation in which he is not designated as a party or to which he has not been made a party *unless* he is in fact adequately represented by parties who are present with the authority to represent him. *Hansberry v. Lee,* 311 U.S. 32, 85 L.Ed 22, 61 S.Ct. 115 (1940).

In *Montana v. United States,* 440 U.S. 147, 59 L.Ed 2d 210, 99 S.Ct. 970 (1978), this Court considered the circumstances under which a non-party can be bound by prior litigation. In *Montana* a contractor on a federal project filed an action in Montana state court alleging that a gross receipts tax on public, but not private, construction projects violated the United States Constitution by discriminating against the federal government and companies which dealt with it. The tax was ultimately upheld as constitutional by the Supreme Court of Montana. Subsequently, the United States filed an action in United States District Court and a three judge panel held that the gross receipts tax violated the supremacy clause. On appeal this Court reversed and held that the United States, although not a party to the state court litigation, was bound by it because the United States had a sufficient "laboring oar" in the conduct of that litigation. In reaching that decision this Court noted the undisputed evidence that the United States required the state court lawsuit to be filed, reviewed and approved the complaint, paid attorneys' fees and costs, directed the appeal and filed an amicus brief. By directing the state court litigation the United States had a full and adequate opportunity to litigate the issues and was therefore bound by that court's decision.

In the instant case the courts below did not, nor could they, find that the Trustee had a "laboring oar" in the Federal Action. The Trustee played no role in the decision to file that action, did not participate in any manner in that action and did not contribute toward attorneys' fees or expenses.

In the absence of virtual representation the courts below found that the Trustee was the Federal Action Plaintiff's "privy" and that he could have intervened in the Federal Ac-

tion.[14] The Court of appeals based that decision on an erroneous factual assumption: that the Federal Action ws pending when Parsons-Montgomery was adjudicated bankrupt. 747 F.2d at ____, Appendix A p. A-23. In fact, the federal action was initiated by Parsons-Mobile and Parsons *after* Parsons-Montgomery was adjudicated bankrupt and a Trustee appointed. The parties to the federal action had no authority to represent - and did not attempt to represent - Parsons-Montgomery. These parties sought only to recover damages they suffered separate and distinct from Parsons-Montgomery. Although Bank on several occasions argued that the Federal Action plaintiffs had suffered no damages separate from the bankrupt corporation and therefore had no standing to bring that action the district court rejected that argument. Since no claims were made on behalf of the bankrupt corporation in the federal action there was no reason for the Trustee to intervene.

Writing for a unanimous court in *Blonder-Tongue v. University of Illinois,* Justice White stated:

> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329. The Trustee in this case has been denied due process of law. His only chance to present evidence and argument on his claim occurred in the State Action. The district court's unprecedented injunction denying him the right to proceed to collect the damages awarded him in that action denies

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[14] The use of the term "privy" in the context of preclusion of nonparties "has been criticized as conclusory and analytically unsound." *Montana v. United States,* 440 U.S. at 154, note 5.

due process of law. This Court should grant certiorari to protect the Trustee's only opportunity to fully and fairly litigate his claims.

III. This Court Should Grant Certiorari To Resolve A Conflict Between The Circuit Courts Of Appeal Created By The Decision Below.

The Court of Appeals opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation. That decision creates a conflict among the circuit courts of appeals which this Court should resolve.

In *General Foods Corporation v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981) the Court of Appeals for the First Circuit held that in order to be virtually represented a party must expressly or impliedly grant another party authority to represent him.[15] In that case two food companies, General Foods Corporation and Rich-SeaPak Corporation brought an action against the Massachusetts Department of Health challenging the constitutionality of state regulation of food labeling. The defendant claimed that an earlier state court judgment in an action brought by two trade associations precluded that action. The district court dismissed the federal action on res judicata grounds. On appeal the court of appeals held that because General Foods had been a member of both trade associations and had contributed $2,500.00 toward expenses of the earlier litigation it had expressly or impliedly authorized the trade association to represent it and for that reason was bound by the prior judgment. The court reversed however as to Rich-SeaPak Corporation because that corpora-

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[15] This definition of virtual representation accords with the *Restatement of the Law of Judgments Second* §41(1)(b).

tion had neither been a member of either trade association nor in any manner directed the prior litigation.[16]

Similarly in *Humphreys v. Tann,* 487 F.2d 666 (6th cir. 1973), *cert. denied,* 416 U.S. 956, 40 L.Ed 2d 307, 94 S.Ct. 1970 (1974). The Sixth Circuit Court of Appeals permitted a plaintiff to sue the owner of an airplane involved in a mid-air collision even though an earlier suit had relieved the owner of liability. Even though the attorney for the plaintiff had participated in pretrial discovery and litigation conferences for the first trial the Court of Appeals for the Sixth Circuit permitted the plaintiff to have a separate day in court to try his theory of liability.

In *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1981) the Ninth Circuit Court of appeals held that an instrument manufacturer was barred from relitigating a patent infringement issue which had been resolved in an earlier action against the manufacturer's distributor. Since the manufacturer had authorized its distributor to represent it in those issues and had directed the prior litigation it had had its opportunity to fully and adequately litigate those issues.

Each of these cases includes as an element of the definition of "virtual representation" the requirement that a party to the prior litigation act with implied or expressed authority of the party now sought to be bound. In the instant case the Eleventh Circuit Court of Appeals has eliminated that element and in doing so has created a new definition of "virtual representation". Because its new definition is in conflict with prior decisions of the First, Second, Sixth and Ninth Circuit Courts of Appeal this Court should grant certiorari to resolve that conflict.

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[16] The United States Court of Appeals for the Second Circuit reached a similar conclusion in *Expert Electric Company v. Levine,* 545 F.2d 1227 (2nd Cir. 1977).

CONCLUSION

The issues presented by this case strike at the heart of our federal system. By establishing the Anti-Injunction Act as an exception to the Full Faith and Credit Act, by expanding the relitigation exception to the Anti-injunction Act and by allowing a federal district court to sit in direct review of a state court decision the courts below have upset the balance between our co-existing independent court systems. When friction arises between those systems this Court must resolve the conflict. The Petition for Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-7395

First Alabama Bank Of Montgomery, N.A.
and Edward Herbert,
Plaintiffs-Appellees,

v.

Parsons Steel, Inc., et al.,
Defendants,

A. Pope Gordon, Trustee in Bankruptcy for the
Estate of Parsons Steel Industries, Inc.,
Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons,
Defendants-Appellants.

December 4, 1984

Appeals from the United States District Court
for the Middle District of Alabama.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

THORNBERRY, Senior Circuit Judge:

Appellants are appealing from a district court order enjoining them from further prosecution of an Alabama circuit court case on the grounds that, under principles of res judicata, the state action should have been barred by a prior federal court judg-

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ment. We hold that, in general, the injunction was not an abuse of discretion. We remand the case, however, with instructions that the district court make further fact findings and, if necessary, modify the existing injunction.

I. *The Facts*

This case involves two separate lawsuits stemming from a series of bank transactions involving the First Alabama Bank of Montgomery ("Bank"), Edward and Melba Parsons, and Parsons Steel Industries, Inc., of Montgomery ("Parsons-Montgomery"). Parsons-Montgomery was a wholly owned subsidiary of Parsons Steel, Inc. ("Parsons-Mobile"), and this parent company was in turn co-owned by Melba and Edward Parsons.[1]

The subsidiary, Parsons-Montgomery, was heavily financed by the Bank, and by the fall of 1978 it owed the Bank one million dollars in secured loans. Anticipating that Parsons-Montgomery would be unable to make payments on these loans, Edward Parsons and the Bank began to discuss the possibility of refinancing the company, or of selling the company to a third party. After one attempt to sell the company failed, the Bank contacted a local businessman and customer, Michael Orange. Although Orange did not want to purchase the company, he and Parsons agreed in December 1978 that Orange would assume management of the company for a fee and a stock option. Orange soon discovered that the company was in worse condition than he had been led to believe, and he resigned. After Orange bailed out, in January 1979 the Bank commenced foreclosure proceedings against Parsons-

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[1] Melba Parsons owned 98 of Parsons-Mobile's 100 shares of stock, Edward Parsons owned one share, and a Baptist minister owned the remaining share.

Montgomery. The subsidiary's assets were sold to Michael Orange's corporation, OSI, Inc.[2] in a foreclosure sale.

The Lawsuits

Edward and Melba Parsons, Parsons-Montgomery and Parsons-Mobile filed suit against the Bank and bank officer Edward Herbert in an Alabama circuit court in February 1979. That suit also named Michael Orange and OSI, Inc. as defendants. The complaint, in essence,[3] alleged that the Bank had fraudulently forced the Parsons to allow Michael Orange to take control of Parsons-Montgomery, and eventually to obtain complete ownership of that company. The complaint also included various counts against Orange and OSI, Inc. alleging *inter alia* wrongful conversion of company assets and breach of fiduciary duty.

In May 1979, Melba and Edward Parsons and Parsons-Mobile filed suit against the Bank in federal district court. Parsons-Montgomery was not a party to this action. That company had been adjudicated an involuntary bankrupt in April 1979 and the trustee in bankruptcy chose not to participate in the suit. In the state action, however, the trustee was added as a party plaintiff by the state court in October 1979.

The complaint filed in federal court alleged that the Bank had violated the Bank Holding Company Act Amendments, 12 U.S.C. §§ 1971-1978 ("BHCA"), by forcing the Parsons to allow Orange to take control, and ultimately ownership, of Parsons-Montgomery. Such action, the complaint alleged, con-

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[2] Michael Orange was chief executive officer of OSI, Inc.

[3] We make no attempt to outline the detailed complaints filed in both state and federal court; our descriptions are intentionally general.

stituted a type of unusual banking procedure prohibited under the Act.[4]

Discovery was conducted jointly and simultaneously in the federal and state actions. The federal court severed the liability issue from the damages issue, and proceeded to trial before the state court action. After a jury trial in favor of the plaintiffs, the court entered a judgment n.o.v. for the defendant Bank in June 1981. This decision was affirmed in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242 (11th Cir. 1982).

The Bank raised the defenses of res judicata and collateral estoppel in state court after the federal judgment was entered, but the state court ruled that res judicata did not bar the state action. Almost a year after the federal judgment, the trustee in bankruptcy for Parsons-Montgomery amended the state court complaint to include a UCC claim that the bank's foreclosure sale of Parsons-Montgomery's assets was commercially unreasonable. In January 1983, Michael Orange and OSI, Inc. were dismissed as defendants in the state suit as a result of a pro tanto settlement. After a jury trial in state court, the jury returned a general verdict in favor of the plaintiffs and awarded a total of four million and one dollars in damages.[5]

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[4] Chapter 22 of the BHCA, adopted in 1970, is directed at bank tying arrangements. *See Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978). It prohibits a bank from conditioning credit upon the requirement that "the customer provide some additional credit, property or service" that is not usually provided in connection with a loan. 12 U.S.C. § 1972(1)(C). A person suing under this statute is entitled to recover treble damages plus attorney's fees. 12 U.S.C. § 1975.

[5] Melba and Edward Parsons were awarded one million dollars each, the trustee in bankruptcy was awarded two million dollars, and Parsons-Mobile, the parent company, was awarded one dollar.

After losing in state court, the Bank and Edward Herbert[6] filed the present action in the same federal district court that had entered the first judgment in the BHCA action. The Bank requested that the district court enjoin the enforcement of the state court judgment on the basis of res judicata and collateral estoppel. The defendants in the present action were the plaintiffs in the state action; Melba and Edward Parsons, Parsons-Mobile, and the trustee in bankruptcy for Parsons-Montgomery.

In a well-reasoned opinion, the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment.[7]

The district court also held that the trustee in bankruptcy, although not a party to the BHCA action, was bound by the judgment in that action because the trustee was in privity with the parties to that action. Because the facts in this case put the

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[6] We will refer to both plaintiffs in this injunction action simply as the "Bank."

[7] 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

trustee in a different posture from the other appellants, we will address the injunction as it relates to the trustee in a separate section of this opinion after we have resolved the other issues raised in this appeal.

II. *Res Judicata — The Parsons*

The district court found that the Parsons attempted to split a single cause of action by asserting a BHCA violation in federal court and claims of fraud and commercial unreasonableness in state court. In both actions the plaintiffs claimed that the Bank had deliberately put Parsons-Montgomery in a position where it could not pay its debts. The Bank then allegedly promised further credit only on the condition that the Parsons allow Michael Orange, a valued customer of the Bank, to take control of the company. The Parsons claimed that they had no choice but to relinquish control of their company. After Orange decided that the management arrangement was unsatisfactory, he and the Bank allegedly devised a plan whereby the Bank would foreclose on the company's assets and Orange's company would purchase the assets at the foreclosure sale. These activities were claimed to be a violation of the BHCA in federal court. The same activities were the basis for the fraud claims in state court. The district court also found that the claim that the foreclosure sale was made at a commercially unreasonable price appeared in the federal case as evidence of damages and in the state case as a violation of the UCC.

In an opinion granting the Bank's motion for judgment n.o.v., the federal court made several important findings of fact in addition to holding that the Bank did not violate the BHCA. The plaintiffs in the BHCA action had attempted to prove that the Bank, as a condition of an extension of credit, required the Parsons to relinquish control and ownership of their business to Orange. The federal court found as a matter of fact that the Bank did not require the Parsons to give up control or ownership of their company. Although the Bank introduced Orange

to Parsons as a potential purchaser of the company, Parsons and Orange reached an agreement independently of the Bank. The agreement provided that Orange was to manage the business in exchange for a fee and a stock option. The court found that the stock option was included in the deal, not as a method by which Orange could wrench ownership away from the Parsons, but simply as a means of compensation because cash flow problems prevented the company from paying Orange entirely in cash. In the final analysis, the district court found that the Bank had not promised the Parsons anything, nor had it forced the Parsons to take any action. It was not until the actual foreclosure and sale of assets, a normal procedure, that the Parsons had to give up ownership of the company's assets, which resulted in Parsons-Montgomery being adjudicated an involuntary bankrupt. It is undisputed that the Bank, at all relevant times, had a right to proceed with this foreclosure.

In view of these findings, the district court in this injunction proceeding found that its earlier judgment was res judicata as to the Parsons' state claims of fraud and commercial unreasonableness.

The principle of res judicata "makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding." *Woods Exploration & Production Company v. Aluminum Company of America,* 438 F.2d 1286, 1312-13 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), (quoting 1B Moore, Federal Practice ¶ 0.405[1] at 6240).[8]

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[8] The confusion generated by the use of the terms "collateral estoppel," "issue preclusion," "claim preclusion" and "res judicata" was addressed by Mr. Justice Blackmun in a recent Supreme Court opinion.

Both Parsons-Mobile and the Parsons were parties to the federal BHCA action, and it is clear that the judgment in that action was a final judgment on the merits. As to these parties, therefore, the only issue is whether the claims made in the state court proceeding involve matters of fact or law that were or should have been adjudicated in the federal BHCA action.

The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982): 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra,* § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. *See id.*, Introductory Note before §24.

This Court on more than one occasion has used the term "res judicata" in a narrow sense, so as to exclude issue preclusion or collateral estoppel. See e.g., *Allen v. McCurry,* 449 U.S. 90, 91 [101 S.Ct. 411, 413, 66 L.Ed.2d 308] (1960); *Brown v. Felsen,* 442 U.S. 127 [99 S.Ct. 2205, 60 L.Ed.2d 767] (1979). When using that formulation, "res judicata" becomes virtually synonymous with "claim preclusion." In order to avoid confusion resulting from the two uses of "res judicata," this opinion utilizes the term "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit. For a helpful explanation of preclusion vocabulary, see Wright, *et al., supra,* § 4402.

Migra v. Warren City School District Board of Education, ____ U.S. ____, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). Although the Supreme Court chose to use the term "claim preclusion" in *Migra,* we will use the term "res judicata" for the simple reason that all of the authority discussed in this opinion speaks in terms of res judicata.

A. THE FRAUD CLAIM

Although the plaintiffs in the BHCA action did not raise the claim of common law fraud, the district court held that they should have raised it. The same primary wrong was alleged in both actions: the Bank wrongfully required the Parsons to give up management and ownership of their business. The damages caused by this "wrong" were the same in both the federal and state actions.

The standard applicable to the present case was clearly set forth in *Woods Exploration.*[9] There the court explained that res judicata applies to separate claims that are simply alternative grounds of recovery for the same basic cause of action. The court stated:

> The principle of *res judicata,* enforceable by injunction, would thus preclude relitigation in the state following this federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered. See Note, Parallel State and Federal Remedies, 71 Harv.L. Rev. 513, 523-24 (1957). Alternatively, even if different standards of recovery existed in the state and federal actions, *res judicata* would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal pro-

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[9] It is undisputed that federal res judicata law applies in the present case where a federal court is determining the effect of a federal judgment. If this court were determining the res judicata effect of a state judgment, the res judicata law of that state would apply. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

> ceedings. See Restatement, Judgments § 62. Focusing on the latter test, we think that the doctrine of pendent jurisdiction, see *Hurn v. Oursler,* 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, afforded plaintiffs opportunity for joinder.

Woods Exploration, 438 F.2d at 1315 (footnote omitted). *See Harper Plastics, Inc. v. Amoco Chemicals Corporation,* 657 F.2d 939 (7th Cir. 1981) (prior judgment is conclusive as to any ground of recovery which might have been presented); *see also Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, 560 (5th Cir. 1983) ("[O]ne who has a choice of more than one remedy for a given wrong,. . .may not assert them serially, in successive actions, but must advance all at once on pain of bar.").

The Parsons' fraud claim was simply an alternative ground of recovery for the acts that were allegedly a violation of the BHCA. The facts forming the basis of the fraud claim were fully adjudicated in the federal BHCA action. As the district court noted, recovery under the BHCA claim would have compensated the Parsons for the total harm suffered. And under the doctrine of pendent jurisdiction, the Parsons had an opportunity to pursue their claim of fraud in federal court. The district court was correct in holding that the judgment in the federal action was res judicata as to the Parsons' fraud claim in the state court.

B. THE UCC CLAIM

Unlike the fraud and BHCA claims, which were merely alternative grounds of recovery for the same wrongdoing, the UCC claim alleges a separate and distinct wrongdoing by the Bank. The UCC claim involves the actual foreclosure sale and alleges the Parsons were wronged by the receipt of an unfairly low price for their assets; whereas, the BHCA and fraud claims involved a wrong allegedly committed during the events leading up to that sale. Nevertheless, the district court correctly held that the UCC claim could have and should have been raised by the Parsons in the federal BHCA action.

Allegations that the sale was commercially unreasonable were included in the federal BHCA complaint as part of the proof of damages. That is, the Parsons alleged that the defendants' wrongful conduct prior to the sale resulted in the Parsons not receiving a fair price for their company assets at the foreclosure sale. However, the reasonableness of the sale price was never actually adjudicated in the BHCA action. The district court bifurcated the trial to handle the question of liability first, and then, if necessary, address damages. Because the damages issue was never reached, evidence of an insufficient price was never presented to the jury.

In state court, the Parsons claimed that the time and terms of the sale were commercially unreasonable under UCC standards. See ALA.CODE §§ 7-9-504, 7-9-507 (1975).[10] UCC section 9-504, which governs the resale of collateral, requires that the creditor send notice and that every aspect of the sale be commercially reasonable, including the method, manner, time, place and terms. The federal court in the BHCA action found that the Parsons waived the notice requirement, leaving open only the question of whether the actual sale was commercially unreasonable. This issue amounts simply to a claim that the price at the sale was insufficient. "The 'method, manner, time, place and terms' tests are really proxies for 'insufficient price,' and their importance lies almost exclusively in the extent they protect against an unfairly low price." White & Summers, Uniform Commercial Code, § 26-9, at 1109 (2d ed. 1980).[11]

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[10] Section 7-9-504 provides that every aspect of the disposition of security of a loan upon foreclosure must be commercially reasonable, and section 7-9-507 provides a cause of action to recover from the secured party any loss caused by a failure to comply with section 7-9-504.

[11] The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the *actual sale* was commercially unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price.

The issue is whether the BHCA proceeding involves the same cause of action as the Parsons asserted in their UCC claim in the state court. We believe the district court was correct in holding that it does. The bar of res judicata "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact.' " *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984). The events leading up to the foreclosure sale and the sale itself involved a series of connected transactions out of which the Parsons' action arose. This is partially evident from the fact that the Parsons found it necessary to allege the facts surrounding the foreclosure sale in order to prove damages in the BHCA action. Although the UCC claim and the BHCA claim alleged distinct acts of wrongdoing, the facts underlying those claims arise out of the same nucleus of operative facts. This is true regardless of what the UCC claim alleges was the cause of the unreasonably low price. A claim that the foreclosure sale violated the UCC should have been raised by the Parsons in the federal action.

The fact that the conduct of the foreclosure sale and the sufficiency of the price were not adjudicated in the BHCA action does not affect the result. "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). Moreover, had the Parsons asserted UCC commerical unreasonableness as a theory of liability in the BHCA action, rather than merely alleging the facts of the sale as proof of damages, the conduct of the sale would have been adjudicated.

The district court was also correct in holding that the Parsons could have raised the state law UCC claim in the federal BHCA action under the doctrine of pendent jurisdiction.

As to the parsons and Parsons-Mobile, none of the district court's fact findings necessary to the determination of res

judicata were clearly erroneous and the court did not err in its conclusion of law. We must now turn to the issue of whether the district court abused its discretion by enjoining the appellants from enforcing the state court judgment.

III. *The Anti-Injunction Act's Relitigtion Exception*

The Anti-Injunction Act prohibits a federal court from enjoining state court litigation unless the injunction falls within one of three limited exceptions: (1) if expressly authorized by Congress; (2) where necessary in aid of a federal court's jurisdiction; and (3) to protect or effectuate a federal court's judgment. 28 U.S.C. § 2283. The district court in the present case issued its injunction under the third of these exceptions, the relitigation exception. As stated in *Woods Exploration,* "[t]he 'relitigation' principle ... means simply that a federal court may enjoin a state court proceeding which is precluded under the doctrine of *res judicata.*" 438 F.2d at 1312.

The district court's earlier judgment in the BHCA action was in favor of the Bank. This judgment was res judicata as to the state action which resulted in a contrary judgment, awarding appellants the damages that were denied them in the federal action. Accordingly, the district court enjoined appellants from enforcing that state court judgment in order to effectuate its own previous judgment.

Although district courts have been warned to be hesitant in enjoining state litigation, *see Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), the decision of whether to take such action remains one of discretion for the district court. *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582 (11th Cir. 1983) ("Within the limits of that discretion, a district court in a given case might go either way and not be reversed."). Because of the sensitive nature of interfering with state court systems, district courts require that

parties requesting an injunction make a strong and unequivocal showing of relitigation. *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332, 1334 (5th Cir.1981), *cert. denied,* 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982). This approach is justified by the idea that "[i]f the federal court is too cautious, 'all is not lost. A state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel.' " *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585-86 (11th Cir. 1983)(quoting *Southern California Petroleum Corp. v. Harper,* 273 F.2d 715, 719 (5th Cir.1960)).

In the present case, however, the district court had the benefit of knowing that the Bank was denied the protections of res judicata and collateral estoppel in state court. As noted by the district court, it is easy to understand how the state court was misled into thinking that the federal cause of action was distinct from the state claims because the pleadings were vague and complicated. The federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action. *See Delta Air Lines,* 708 F.2d at 586 (district judge who presided over federal ction was in best position to assess whether claims raised in state court were the same as those asserted in federal action). After finding the BHCA action to be res judicata to the subsequent state action, the district court was justified in holding that an injunction was necessary to effectuate its prior judgment.

Appellants raise a variety of arguments as to why the injunction was an abuse of discretion. First, they assert that the state court has already ruled on the question of whether the BHCA was res judicata as to the state court action. Because the state court held that the federal action was not res judicata, appellants argue, the Bank is now collaterally estopped from relitigating this issue in federal court.

It is true that, as between courts in two states, if one court (court A) holds that a prior judgment in the court of another state (court B) is not res judicata as to the action in court A, court B is then bound by this determination under the Full Faith and Credit Clause of the Constitution. U.S. Const. ARt. IV, § 1. *See* Wright, Miller, & Cooper, Federal Practice and Procedure, § 4404 (1981). It is also true that federal courts are generally bound by state court rulings under the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738. In absence of federal law modifying the operation of § 1738, we would give the Alabama circuit court's res judicata ruling the same effect it would be accorded in the courts of that state. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984). In the present case, however, the operation of § 1738 is modified by federal law: the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

The relitigation exception was added to the Anti-Injunction Act in 1948 to codify the doctrine which allowed federal courts to enjoin relitigation in state courts of issues that federal courts had already adjudicated. *International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125, 130 (5th Cir.1975). the legislation abrogated the Supreme Court decision in *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1921), which had rejected this doctrine.[12] In discussing the nature of the relitigation exception, the Fifth Circuit stated,

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[12] The Revisor's Note to the 1948 revision of the Anti-Injunction Act states "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts." Historical and Revision Notes following 28 U.S.C.A. § 2283. *See International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125, 130 n. 8 (5th Cir.1975).

> Rather than doing violence to principles of federalism, [the relitigation exception], when applied in a proper case, enhances them. As we observed in [*Jacksonville Blow Pipe Co. v. Reconstruction Blow Pipe Corp.*, 244 F.2d 394 (5th Cir.1957)], "nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." 244 F.2d at 400. We advanced an even more practical justification for this doctrine in the *Woods Exploration* case: the relitigation exception "prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review," 438 F.2d at 1312, citing Note, Federal Power to Enjoin State Court Proceedings, 74 Harv.L.Rev. 726, 734 (1961).

International Association of Machinists & Aerospace Workers v. Nix, 512 F.2d at 130-131.

It is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata. *Woods Exploration*, 438 F.2d at 1312. A state court's determination of the res judicata effect of a federal court's prior judgment cannot be used to vitiate a federal court's injunction power under the relitigation exception. We therefore hold that, while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action.[13]

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[13] To hold otherwise would mean that a party with a prior federal judgment in its favor would be required to rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first. Such an outcome would initiate a first in time rule which is clearly inappropriate where Congress has provided federal courts with the power to protect or effectuate their judgments.

Appellants' next two arguments relate to the point in time at which the Bank requested a federal injunction. First, appellants argue that the Bank waived its right to an injunction by waiting until after the state action had been tried before requesting an injunction under the relitigation exception. The Bank argues that if it had requested an injunction before the state trial, the federal court would have been inclined to deny the injunction since the state court pleadings obfuscated the fact that the state action involved the same basic cause of action which was tried in the BHCA action. The district court agreed that the pleadings were the source of confusion in these two actions and held that the Bank had not waived its right to an injunction by delaying until after the state trial. We see no reason to disturb this holding. The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified.

Alternatively, appellants argue that the Bank's request for an injunction is premature. They assert that an injunction is improper so long as the Bank continues to have a remedy at law. The remedy at law in this case, appellants argue, is the Bank's right to appeal the Alabama circuit court judgment to a state appellate court. This argument has no merit. It would apply with equal force to a party seeking an injunction before a state trial. There, the argument would be that the party's remedy at law was resolution of the issue in the state trial court. In both situations, once it is apparent that a prior federal judgment is res judicata, there is no need to allow a state court system to waste time and effort on the issue. No remedy at law exists to protect the Bank from having to pursue the state action on appeal, just as no remedy at law exists to protect a party from having to relitigate an issue at trial. A federal court is empowered to enjoin state court proceedings to protect its judgment and § 2283 does not limit this power to specific points in time in state court trials or appellate procedure. *See, e.g., Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir.1980) (district court properly granted injunction which nullified Alabama Supreme Court directive).

Appellants' next argument is that an injunction is unfair in this case because they could not properly join their state claims in federal court. The district court held that appellants could have, and should have raised these claims under pendent jurisdiction. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (pendent jurisdiction available where claims arise out of a common nucleus of operative fact and be of such nature that one would expect the plaintiff to try them together). Appellants argue, however, that to properly litigate their fraud claims, it would have been necessary to join Michael Orange and OSI, Inc. as defendants in the federal action.[14] Because no independent federal claims were asserted against these additional defendants, appellants argue that they could not be joined as defendants in federal court. This argument misconstrued teh doctrine of pendent party jurisdiction. This circuit explained the nature of pendent party jurisdiction in *Williams v. Bennett,* 689 F.2d 1370 (11th Cir.1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983):

> Under this theory, a court in some limited circumstances may bring in "state" parties over which it could not otherwise exercise jurisdiction. *See Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1377 n. 7 (5th Cir. 1980); *Boudreaux v. Puckett,* 611 F.2d 1028, 1030-31 (5th Cir. 1980); *see, e.g., Connecticut General Life Insurance Co. v. Craton,* 405 F.2d 41 (5th Cir.1968). The exercise of such pendent party jurisdiction turns on judicial economy considerations and whether "... Congress has expressly or impliedly negated the existence of jurisdiction of a pendent claim or party." *Boudreaux,* 611 F.2d at 1031.

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[14] Orange and OSI, Inc. were defendants in the state action originally, but were later dismissed as a result of a pro tanto settlement.

689 F.2d at 1379 (footnote omitted).

Congress has not expressly or impliedly negated the existence of pendent party jurisdiction in the BHCA, the statute which gave rise to federal jurisdiction in the first action.[15] *Compare Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976)(holding that Congress had negated pendent party jurisdiction over a county in a § 1983 action) *with Lykins v. Pointer Incorporated,* 725 F.2d 645 (11th Cir.1984) (holding that pendent party jurisdiction is available in the context of 28 U.S.C. § 1346(b), which grants federal jurisdiction over torts claims against the United States).

The district court therefore had the power to assert pendent party jurisdiction over Michael Orange and OSI, Inc. The exercise of this jurisdiction is a discretionary decision reserved to the district court. *Williams v. Bennett,* 689 F.2d at 1379. *See also Lykins v. Pointer Incorporated,* 725 F.2d 645 (11th Cir.1984).

The possibility that the district court might have refused to exercise pendent party jurisdiction does not help appellants' position. We agree with the Seventh Circuit's view of this argument.

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[15] 12 U.S.C. § 1975 provided federal jurisdiction in the BHCA action. That section provides:

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including reasonable attorney's fees.

The BHCA, which is aimed at preventing tying arrangements with banks, seems to contemplate the involvement of third parties in federal suits since most tying arrangements do involve third parties. It is not inconsistent with this statute that these third parties be joined in an attempt to resolve all claims arising out of the nucleus of operative facts giving rise to a BHCA action.

> We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder. *See Federated Department Stores v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)(Blackmun, J., concurring); *Woods Exploration and Producing Co. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir.1971).

Harper Plastics v. Amoco Chemicals Corporation, 657 F.2d 939, 946 (7th Cir.1981).

IV. *Res Judicata—The Trustee in Bankruptcy*

Neither Parsons-Montgomery nor the trustee in bankruptcy for Parsons-Montgomery ("Trustee") was a party to the BHCA action. Viewing the federal and state actions based on the Bank's presale activities as frivolous, the Trustee declined to participate in either action. In the state court action, however, he was involuntarily joined as a party plaintiff. The Trustee later amended the state complaint to join the UCC claim. He was delightfully surprised with a two million dollar judgment in the state suit, and is now arguing vigorously that the federal district court injunction was an abuse of discretion.

In addition to arguing most of the issues previously addressed in this opinion, the Trustee also asserts that the BHCA judgment cannot be res judicata as to him, because he was not a party to that suit. The district court in this injunction proceeding found that the Trustee was bound by res judicata because he was in privity with the plaintiffs in the BHCA action. "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the

suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corporation v. Askew,* 511 F.2d 710, 719 (5th cir.1975), *cert. denied,* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). "The question of whether a party's interests in a case are virtually representative of the interests of a non-party is one of fact for the trial court." 511 F.2d at 719.

The district court found that the Trustee was in privity with the Parsons as to all claims that were or should have been raised in the federal action and therefore the Trustee was barred by res judicata to the same extent as the Parsons. We may reverse the district court's findings of privity only if clearly erroneous.

A finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper. Wright, Miller, & Cooper, 18 Federal Practice and Procedure § 4459, at p. 418 (1981). "Modern decisions search directly for circumstances that justify preclusion... This process often leads to a conclusion that preclusion is justified as to some matters but not others." *Id.,* at p. 419. In order to determine whether the district court was clearly erroneous in its finding of privity we must examine the facts and circumstances surrounding both the fraud and the UCC claims.

A. THE FRAUD CLAIM

The district court found that the cause of action asserted in the BHCA action belonged primarily to Parsons-Montgomery. That corporation would have been entitled to all or part of the damages awarded if the Parsons had prevailed on the liability question. The Parsons' interests in the BHCA action were therefore virtually representative of Parsons-Montgomery. In determining that the Trustee for Parsons-Montgomery was also virtually represented by the Parsons in the BHCA action, the district court relied on *In re Four Corners Enterprises,* 17 B.R. 156 (Bkrtcy.M.D.Tenn.1982), which rejected the argument that a trustee in bankruptcy who was not a party to a federal action should not be barred by res judicata principles from bringing a

state court action. The district court opinion included the following quotation from *In re Four Corners:*

> The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue. *Four Corners,* supra, at 160. (parenthetical expression added).

Also of value in this analysis is the district court's quotation taken from *Paradise v. Vogtlandishe Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir.1938):

> It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted].

The federal suit alleged that the Bank's actions in negotiating the loan and in "conspiring" with Michael Orange violated the BHCA. [The BHCA action was pending in federal court when

Parsons-Montgomery was adjudicated bankrupt.] The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit was frivolous and would be a waste of money for the unsecured creditors he represents. The facts that allegedly constituted a violation of the BHCA in the federal action were identical to the facts that allegedly constituted fraud in the state action, and, in both cases, the entity primarily wronged by the Bank's alleged activities was Parsons-Montgomery, the bankrupt corporation. The district court found that if recovery were warranted under either of these theories—BHCA or fraud—Parsons-Montgomery, and thus the Trustee, would be the party entitled to most of the damages. The district court therefore correctly found that the Trustee had an identity of interests with the plaintiffs in the BHCA action and that the Trustee was virtually represented by the Parsons as to the issues litigated in that action. As to the fraud claim, therefore, the district court did not err in its finding of privity. Since the fraud claim could and should have been raised in the federal action as an alternate theory of recovery for the same wrong, the Trustee is barred by res judicata from bringing the fraud claim in the state court.

B. THE UCC CLAIM

After the Trustee was involuntarily joined in the state action, and almost a year after the federal court judgment in the Bank's favor, the Trustee amended his complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation. The district court correctly held that the Parsons are barred from litigating the UCC claim in state court because they should have

raised it in the BHCA action. The unique facts of this case, however, cause us to be reluctant to automatically find the Trustee was in privity with the Parsons as to the UCC claim.

The district court found that the federal BHCA action and the state actions for fraud and commercial unreasonableness were based on the same factual allegations. The record clearly supports this finding as to the fraud claim. The record on appeal is insufficient however, to determine whether this finding is correct as to the UCC claim. As noted in footnote 11, *supra,* the record on appeal is not clear as to whether the claim of commercial unreasonableness rests on allegations of improprieties in the handling of the sale itself or whether it rests on the same allegations of pre-sale improprieties that formed the basis of the fraud and BHCA claims. As to the Parsons, this distinction is of no consequence—regardless of the basis of the UCC claim, the events leading up to the sale and the sale itself constituted a series of connected transactions, and the Parsons should have raised commercial unreasonableness in the federal action. We believe, however, that as to the Trustee, the basis of the UCC claim must be determined. A finding of privity as to one claim does not necessarily and automatically extend that finding to all claims. Since the Trustee was not a party to the federal action and since the reasonableness of the sale price was not adjudicated in that action, we believe that equity demands we examine the basis of the UCC claim in order to determine whether a finding of privity as to that claim is justified in light of the circumstances.

If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and

fraud claims. The Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters.

If, however, the UCC claim is based on alleged improprieties connected with the conduct of the foreclosure sale itself (separate and apart from any of the events leading up to the sale), under the facts of this case equity dictates that the Trustee be allowed to pursue this narrow claim in state court. The record shows that the Trustee made a conscious decision not to join in the federal suit because the suit was based *solely* on a federal cause of action involving *solely* the pre-sale events, and the Trustee correctly believed the action to be without merit. He did not believe there was a meritorious action based on those facts and he did not voluntarily join the state court fraud action based on those same facts. When he was involuntarily joined in the state suit he raised the claim he did believe had merit—the state law UCC claim. Neither the reasonableness of the handling of the foreclosure sale nor the sufficiency of the sale price had been adjudicated in the federal action. Moreover, the claims originally pursued by the Parsons—the BHCA and the fraud claim—allowed the possibility of their recovering treble or punitive damages, respectively. The UCC claim presumably leads only to an award of damages amounting to the difference between a fair price for the company assets and the price actually received. The Parsons showed no interest in pursuing a UCC claim until it was added by the Trustee in the state court. Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action.

The above considerations lead us to conclude that the unique circumstances of this case do not justify preclusion of a UCC claim based on facts involving solely the conditions of the sale itself and the Trustee should not be found to be in privity with

the Parsons as to such a claim. A finding of privity in these circumstances would be clearly erroneous.

It is therefore necessary to remand the case for findings of fact regarding what allegations form the basis of the Trustee's UCC claim. If the UCC claim is found to be based solely on the actual handling of the foreclosure sale (method, time, place, manner, etc.), the injunction should be modified to allow the Trustee to pursue this claim. Forcing the Bank to litigate this particular issue is not as inequitable as allowing relitigation of the events leading up to the foreclosure sale, since facts involving the actual sale were not developed in the federal action. Because the state judgment was a general verdict, the district court's injunction against the enforcement of the entire judgment must stand. If the Trustee does have a separate cause of action based on the actual sale, he must pursue it in a separate proceeding.

We therefore hold that, in general the injunction was not an abuse of discretion. We remand the case[16] for further fact findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale.

AFFIRMED IN PART and REMANDED IN PART, with costs of appeal assessed against appellants.

HILL, Circuit Judge, dissenting:

This case presents a thorny problem of federal and state court relations. The law in the area appears relatively unclear, and, with regard to many of the issues addressed in the majority's opinion, the Supreme Court has yet to afford us guidance. In-

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[16] The remand of this case is for the narrow purpose of determining whether the Trustee should be barred from bringing his UCC action against the Bank. The injunction as it now stands is affirmed as to all other appellants in this case.

deed, the Supreme Court may choose to use this case to set forth more definite standards. In my view the majority's opinion presents the best case that may be made for upholding (in large part) the action of the district judge. Nevertheless, I dissent.

First, I do not agree with the majority's conclusion that the Anti-Injunction Act, 28 U.S.C. § 2283, implicitly amended the Full Faith and Credit Act, 28 U.S.C. § 1738. I see no reason why the two sections cannot be construed harmoniously. I would conclude that section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed teh res judicata issue on the merits. In cases in which the state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue. It is the latter situation that presents itself in this case.

The majority notes that the construction I advocate might well lead to an unseemly "rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first." Majority Opinion at note 12. Although this might well create a difficult problem, the courts have long tolerated simultaneous actions despite the inherent inefficiency of such a system. *See* 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4404 at 22-23. It seems to me that the construction adopted by the majority allows the party in the position of the bank in this case to have two bites at the apple. After losing its attempt to assert the defense of res judicata in the state court, that party may go to the federal court. This scenario is at least as troublesome as the problem envisioned by the majority.

My views on this issue are substantially in accord with those of the authors of the Wright, Miller & Cooper Treatise on Federal Practice and Procedure:

> The principles of res judicata apply to preclude relitigation of the res judicata issue just as cogently as with any other issue, and perhaps even more cogently. As between separate systems of courts, it has been argued with great force that the full faith and credit issue should be open to reexamination in a third forum at the behest of a litigant who by unsuccessfully seeking review in the Supreme Court has exhausted the possibility of impartial review of a second decision that designs the res judicata effects of the first judgment. On balance, however, it seems better to deny such reexamination. The fundamental arguments for reexamination are that a state court cannot be entrusted with final competence to deny federal constitutional protections that are designed to protect against parochial state interests and that the Supreme Court cannot afford effective review in light of convening demands on its time. State court judgments have been given preclusive effect as to many other federal constitutional questions, however, and experience has not shown any apparent reason to be specially distrusting in this area. The general values of repose suggest that preclusion should attach to state adjudication of the full faith and credit issue just as to any other.

Id. § 4404 at 28-29 (footnote omitted).

Assuming, however, that the majority has correctly interpreted the effect of the Anti-Injunction Act on the Full Faith and Credit Act, I nevertheless disagree with the result. The majority correctly notes that "[w]ithin the limits of [its] discretion, a district court in a given case might go either way [granting or denying the injunction] and not be reversed." *Delta Air Lines v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir.1983). If the district judge has not abused his discretion in this case, however, I can envision no case in which the entry of an injunction would be improper. The state lawsuit and the federal lawsuit at issue here involve different parties and, arguably, dif-

ferent causes of action. Although the district judge no doubt resolved some of the factual disputes present in the state court action when he entered a directed verdict in the federal court action, the plaintiffs in that original case were unable to secure a review of his conclusions. On appeal, this court held that under no set of facts would the actions of the bank defendant violate the provisions of the Bank Holding Company Act. *See parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242 (11th Cir.1982). And, as the majority correctly notes, the commercial reasonableness claims—the factual basis for which is unclear on the present record—wer enot pleaded at all in the federal action. As we recently stated in *Delta Air Lines:*

> Under the relitigation exception to the Anti-Injunction Act, however, a federal court may enjoin the state proceeding only if necessary to protect or effectuate its own judgment. . . . A federal court's judgment is presumably far more threatened if the state proceeding involves the same issues than if it involves only the issues that could have been, but were not, raised.

708 F.2d at 586.

Furthermore, in this case, the bank waited until the state court had reached judgment on both the res judicata issue and on the merits of the case before requesting an injunction from the federal district court. Although the majority would apparently disagree, it seems to me that such delay serves only further to complicate the relations between the state and federal courts. Barring an instance in which the bank waited to obtain an injunction from the federal court until after it had filed and prosecuted its state court appeal, I can envision no situation that is more likely to create discord and duplication of efforts than the one in this case.

My conclusion that the injunction was improperly issued is in spite of the fact that I tend to agree with the district court and my colleagues in the majority that the state court litigation repeated the federal court issues—or issues that could have been resolved there. Federalism, expressed in 28 U.S.C. § 1738, requires us to accord full faith and credit to judgments with which we may not agree, or else it requires nothing at all. For these reasons, I would reverse the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83-V-181-N

First Alabama Bank of
Montgomery, N.A.; et al,
Plaintiffs,

vs.

Parsons Steel, Inc.; et al,
Defendants.

OPINION

This cause is submitted on the pleadings and evidence before the Court for an injunction against prosecution of a judgment and proceeding in the Courts of the State of Alabama on the bases of res judicata and collateral estoppel. Plaintiffs, First Alabama Bank and its Vice-President Edward Herbert, insist that this Court has heretofore found in favor of Plaintiff Bank [Defendant in an earlier suit in this Court, *Parsons Steel, Inc., et al v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11th Cir. 1982)] based on substantially the same factual allegations and that some Defendants herein [Plaintiffs in the prior suit in this Court and in the current State Court suit] sought to split their causes of action and sue in the federal court for violation of the Bank Holding Company Act [12 U.S.C. §§ 1971, *et seq.*] and in the State court for common law fraud and commercial unreasonableness. The federal court action proceeded to the earlier judgment, the same being in favor of Defendant Bank, and the State court action resulted in a judgment for the assorted Plaintiffs for $4,000,001.00 against the Defendants. The State court action is now pending before State appellate courts. The Plaintiffs insist that this Court, pursuant

to 28 U.S.C. § 2283, has jurisdiction and should exercise the same to protect or effectuate their judgment. The Defendants insist that 28 U.S.C. § 2283 proscribes this suit.

Authorities are well documented that identical parties may not relitigate identical issues in separate courts. A very large part of the costs of litigation is on the public, and the courts, as well as the public, are interested in avoiding multiplicity of litigation under the doctrine of res judicata and other principles of law. This does not mean that every cause of action in existence between parties must necessarily be litigated at the same time. See, *Bragg v. Jim Skinner Ford,* 17 A.B.R. 1412, indicating that purchaser of a car might sue in separate lawsuits for failure to disclose financing terms under the Truth-in-Lending Act, 15 U.S.C. § 1631, and later sue for breach of warranties on the sale of the automobile. However, as pointed out by the United States Court of Appeals for the Fifth Circuit in *Meridian Investing & Dev. Corp. v. Sunco Highland Corp.,* 628 F.2d 370, 372, a federal district court "may not abdicate its authority or duty in favor of State jurisdiction," even though federal courts are most reluctant to encroach on State court jurisdiction. See, also, *Ermentrout v. Commonwealth Oil Co.,* 220 F.2d 527, 530 (5th Cir. 1955). In short, it is clear that the same causes of action may not be litigated a second time between the same parties after final judgment on one or the other proceedings.

A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit. The United States Court of Appeals for the Fifth Circuit seems to clearly answer this proposition in *Woods Exploration & Tro. Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir. 1971), cert.den. 404 U.S. 1047 (1972):

> "The principle of res judicata, enforceable by injunction, would thus preclude relitigation in the state following this

> federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered ***. Alternatively, even if different standards of recovery existed in the state and federal actions, res judicata would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings ***. Focusing on the latter test, we think that the doctrine of pendent jurisdiction *** afforded plaintiffs opportunity for joinder."

As articulated in *Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 945 (7th Cir. 1981), "res judicata operates to prevent the splitting of a single cause of action and the use of several grounds of recovery under the same action as the basis for separate suits." See, also, *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316, 320 (1926), recognizing that there must be an end to litigation. Plaintiffs in the original suit in this Court sued under the Bank Holding Company Act and proceeded to attempt to show that the Bank, by promising unlimited credit, induced the various Parsons entities to overextend their credit; that the Bank on threat of denying further credit forced Parsons Montgomery to employ Orange as manager; and that, thereafter, the Bank foreclosed its mortgage on Parsons' property and sold for commercially unreasonable prices.[1] The promise to finance, offered as evidence of the preamble to the alle-

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[1] Plaintiffs' objective was to show that the Bank required unusual services or actions of the creditor as a condition of making a loan, all being in violation of the Bank Holding Company Act. Plaintiffs insisted that the unusual services required were that Mr. Orange, a former customer of the Bank, be employed as manager of Parsons Montgomery and that he be given a right to buy controlling ownership of the corporation. This Court, and ultimately the Court of Appeals for the Eleventh Circuit, concluded that the Bank had not required any unusual banking practice, and judgment was entered for the Bank.

ed Bank Holding Company Act violation in federal court, is alleged as a fraud in the State court. The mortgage foreclosure sale for commercially unreasonable prices appeared in the federal case as evidence of damages and in the State case as a violation of CODE OF ALABAMA, §§ 7-9-504, 7-9-507. Section 7-9-504 provides that every aspect of disposition of security for a loan upon foreclosure "must be commercially reasonable", and §7-9-507 provides a cause of action "*** to recover from the secured party any loss caused by a failure to comply with ***" § 7-9-504. Evidence of the participation of Herbert, Orange and O.S.I., Inc., was offered in the federal trial as tending to show a conspiracy by the Bank with those parties to take advantage of the Parsons. This conspiracy could and should have been pleaded in the federal proceeding by the Plaintiffs.

Paragraph 40 of the federal complaint and Paragraph 38 of the State complaint indicate that damages claimed to have been caused by the alleged wrongs in each suit are substantially the same. It would, therefore, appear that, in the words of *Woods,* supra, "recovery in the federal suit [would] have compensated plaintiffs for the total harm suffered," and "plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings." As shown in *United Mine Workers v. Gibbs,* 383 U.S. 715, a federal court has power to hear State claims if it has subject matter jurisdiction of the federal claim and if the State claims arise from "a common nucleus of supportive fact" so that plaintiff would ordinarily be expected to try them in one proceeding. The doctrine of pendent jurisdiction afforded Parsons an opportunity for that joinder. Instead, they chose to split the alleged wrongs with the apparent scheme of relitigating the matter in the event of an adverse decision in the first court.

The United States Court of Appeals for the Fifth Circuit, as recently as April 1, 1983, set out the law applicable also to this Circuit, absent showing to the contrary, in the case of *Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, at 560, as follows:

> "And it is equally settled that one who has choice of more than one remedy for a given wrong, *** may not assert them serially, in successive actions, but must advance all at once on pain of bar."

In *Nilsen* the plaintiff had filed suit under 42 U.S.C. § 1983 to recover in a sex discrimination suit for which relief had already been denied her in a suit claiming a parallel remedy under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. Relief under § 2000e had been denied the plaintiff because suit under that section was barred by the statute of limitations. The Court reasoned that the decision was on the merits and that the plaintiff was barred from proceeding in the second suit because of her unexplained dilatoriness in not pleading in the same proceeding all causes of action arising from the same set of facts.

Mr. and Mrs. Parsons and Parsons Steel, Inc., were parties to the federal proceeding against the Bank. The complaint was that the Bank acted through its Vice-President, Edward Herbert. Herbert was in privity with the Bank, and his wrong, if any, should have been charged in the federal court proceeding. It, therefore, appears that the Plaintiffs in the federal suit - Mr. and Mrs. Parsons and Parsons Steel, Inc. - should have been barred from maintaining the suit in the Circuit Court of Montgomery County, Alabama, upon issuance of the judgment of this Court in the suit filed by them against the First Alabama Bank and Mr. Herbert.

However, a fourth plaintiff, A. Pope Gordon, Trustee of the Bankrupt Corporation Parsons Steel Industries (Parsons Montgomery), was not a party to the federal court proceedings and may not be barred by the doctrine of res judicata unless Mr. Gordon, as Trustee, was privy to the parties in the original proceeding. This Court notes from depositions in the file of this Court, of which this Court may take judicial knowledge, that Trustee Gordon was represented by attorneys who participated in the taking of depositions which contained stipulations that the depositions could be used in both the State and federal

cases. See the deposition of Hon. Luther H. Waller, Jr., taken on January 28, 1980. Mr. Waller's deposition shows that the attorney for Trustee Gordon actually participated in the deposition, and Trustee Gordon could hardly argue that he did not have notice of the federal court proceeding under such circumstances. The United States Court of Appeals for the Seventh Circuit, in discussing the inter-relationship between 28 U.S.C. § 2283(the Anti-Injunction Act), the doctrine of res judicata and the doctrine of collateral estoppel, makes the following statement:

> "The 'effectuate its judgments' exception was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court, thus abrogating *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). 28 U.S.C.A. § 2283, Revisor's Note; 1A, Part 2 J. Moore, *Federal Practice* ¶ 0.208[2]-[3] (2d ed. 1974); *Doe v. Ceci,* 517 F.2d 1203, 1207 (7th Cir. 1975). As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions 'is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.' 314 U.S. at 144, 62 S.Ct. 149.
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> "The relitigation exception of § 2283 applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon. *International Association of Machinists v. Nix,* 512 F.2d 125, 132 (5th Cir. 1975). We have even applied it to preclude an ancillary claim that could have been, but was not, asserted in the federal action, *Lee v. Terminal Transport Co.*, 282 F.2d 805, 807

(7th Cir. 1960), *cert.denied,* 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961), ***." *Samuel C. Ennis & Co. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976).

The *Ennis* case overruled the denial of an injunction by a district judge. The Appellate Court held that a trustee in bankruptcy and various other participants in a bankruptcy proceeding were entitled to federal injunctive relief against State action to preclude relitigation of issues decided in their favor by the Bankruptcy Court, as were individuals who, though not parties to the bankruptcy, were either attorneys for parties or did business with the bankrupt estate by buying real estate or arranging sales, as such parties were entitled to assert collateral estoppel, or issue preclusion, as to issues sought to be relitigated in the State action.

> "[T]he bankrupt, Woodmar Realty Company, an appellee here, was represented by Attorney Owen W. Crumpacker, the other appellee here. More than five years after the termination of the proceeding (in bankruptcy), Woodmar, represented by the same attorney, filed a damage suit in an Indiana state court charging the trustee in bankruptcy and various other participants in the bankruptcy proceeding with perpetrating a fraud on the bankruptcy court. The defendants in that action, after first moving to dismiss it, filed this federal action against appellees seeking to enjoin the state action. The District Court dismissed this action on the ground that 28 U.S.C. § 2283 forbids the relief sought." (parenthetical expression added). *Ennis,* supra, at 46-47. The Court of Appeals reversed the District Court.

Ennis incidentally rejected the principle of waiver or estoppel of the right to assert the defense of res judicata because of a delay of one year in asserting the same after bringing of the State Court action under circumstances similar to these. In *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176 (1981), a case heavily relied upon by the Parsons to defeat an injunction,

the Court of Appeals affirmed Judge Hobbs' denial of a stay of State Court proceedings, 88 F.R.D. 359. That case accurately states the law[2] pertinent to this type of case, but the facts and the result vary considerably from this case. The District Court recognized that the nonresident (1) had a right, and declined, to remove the litigation to federal court when it was first filed, (2) disregarded the trial court's order, and (3) suffered adverse determination of all issues except the amount of damages before seeking a haven in federal court. Here, the Parsons suffered a federal court judgment before the State court trial. The Defendant in that State court, having by-passed federal removal but having found State court distasteful, sought by injunction to obtain the effective removal so as to relitigate the liability found against it in the State court. To have allowed such relief to Plaintiffs in that case would, in effect, have defeated the purpose of the doctrine of res judicata and would have encouraged every non-resident to sample the climate of State litigation before deciding whether or not to seek a federal hearing. The trial judge assumed, arguendo, that he had discretion to grant the stay but declined to exercise the discretion to relitigate issues decided in the State court. In the instant case, the State court failed to show the same comity to this Court.

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[2] "Where a federal court is asked to interfere with pending state court proceedings, it must proceed with caution, taking into account general considerations of federalism and, in particular, likelihood of seriously disrupting the legitimate functioning of the judicial system of state." *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176, 1177.

"*** res judicata precludes relitigation of an action were four 'essential elements' are satisfied: (1) a prior judgment has been rendered by a court of competent jurisdiction; (2) there is substantial identity of the parties in the two suits; (3) there is identity of issues in the two suits; and (4) the prior judgment was rendered on the merits. *Ozley v. Guthrie,* 372 So.2d 860, 861 (Ala. 1979)(citing *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978)). 'Where these elements are present ... the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action.' *Ozley,* supra, at 861 (citing *McGruder v. B & L Construction Co.,* 331 So.2d 257 (Ala. 1976)).***." *Ultracashmere,* supra, at 1183-84.

An argument by another trustee in bankruptcy, that he was not a party to a federal action and, therefore, should not be barred from bringing a State court action by the principles of res judicata and collateral estoppel, was rejected by a bankruptcy court. *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982). In *Four Corners,* creditors and former majority shareholders of the debtor corporation sued the sole shareholder of the debtor corporation to recover on a promissory note. The defense in the federal court was that the note was an obligation of the corporation only and not of the sole shareholder thereof. The plaintiffs in *Four Corners* countered by contending that the stockholder was personally liable because he had operated the corporation as its alter ego. The court found against the plaintiffs and dismissed the case. Subsequently, the trustee of the debtor corporation brought an action against the sole stockholder to charge him personally liable for the corporate debts. The court held that this attempt at relitigation was barred under the doctrine of collateral estoppel, by the prior litigation of the former stockholders of the debtor corporation, stating the following:

> "The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue." *Four Corners,* supra, at 160. (parenthetical expression added).

The relative positions of the trustee and the bankrupt are discussed in *Paradise v. Vogtlandische Maschinen-Fabrik*, 99 F.2d 53, 55 (3rd Cir. 1938), wherein the court said:

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted]."

A trustee in bankruptcy would also be precluded from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so.

Parsons rely, for their contention that the Trustee could not have intervened in the federal proceeding, upon *Blake v. Pullen*, 554 F.2d 947, to the effect that permissive intervention under Rule 24 must be supported by independent jurisdictional grounds. The damages sought by Parsons against the Bank in the federal court speifically involved damages allegedly done to Mr. and Mrs. Parsons and their almost wholly-owned corporation (Parsons Mobile) allegedly as a proximate result of dealing between the Bank, acting through its Vice-President Herbert, and its debtor, Parsons Montgomery, acting through Mr. Parsons and, to some extent, Mrs. Parsons, who pledged some of the property of Parsons Mobile for security. Viewing the barebone, though complicated, pleadings in retrospect, this Court is now firmly of the opinion that Parsons Montgomery (more properly its Trustee in Bankruptcy) was the primary, if not sole, party damaged by the alleged violation of the Bank

Holding Company Act. Parsons Mobile was primarily damaged by damage to its wholly-owned subsidiary, and Mr. and Mrs. Parsons, as controlling stockholders in Parsons Mobile, were damaged largely because of the bankruptcy of the subsidiary, Parsons Montgomery. This Court is firmly of the opinion that any right of the creditors of Parsons Montgomery could have been asserted in the federal proceeding. The Trustee had the option to join in that suit or to await a judgment, if any, and assert the creditors' rights against the stockholders of the bankrupt corporation if they had been successful in the federal action. The Trustee, viewing both the federal and the State proceedings as a waste of effort, declined to join or did not consider joining in either. The Trustee was joined in the State court proceeding involuntarily on motion of the Bank. While the jury disagreed, the wisdom of the Trustee's reluctance to expend the creditors' money in processing these two complaints is understandable to this Court. Once the defects of the Bank Holding Company Act claim, obscured by barebone pleadings were clarified by the evidence, the failure of the federal claim was assured, even though the claim was vaguely substantial enough to give federal jurisdiction of State claims arising from the common nucleus of supporting facts. The decision not to subject the creditors to the expense of prosecuting the State claims arose from reasonable concerns: (1) the fraud claim arose from Parsons' claimn that the Bank fraudulently promised him unlimited credit - one who has dealt with banks would doubt that a jury would believe that unlimited credit would be promised to anyone by any reputable banker; (2) the claim for sale of secured property at a commercially unreasonable price was hardly an enviable plaintiff's case when Parsons admitted the debt and had an opportunity to secure a better sales price; and (3) the claims for violation of fiduciary relationships, when both the Bank and Orange appeared to operate at arms-length in business relationships with the Parsons' entities in situations where everyone hoped to prosper, hardly appeared to offer great hope. This Court is of the opinion that the Trustee had

reasonable cause to be unimpressed with the Parsons' chances of success.

This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceeding and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong. The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest. The Bank's reasons for relitigating in the State court before seeking relief from this Court can only be imagined, but Defendants did everything possible in the State court to demonstrate applicability of the doctrines of res judicata and collateral estoppel before returning to this Court. The pleadings were complicated, and the claims of the Plaintiffs were vague. This Court, having considered the same transactions, can understand the problem of proving without a trial those defenses to a court unfamiliar with the federal case. This Court is, therefore, of the opinion that neither waiver nor estoppel will bar Plaintiffs' bringing this suit to bar further relitigation of proceedings already decided in this Court.

Judgment with costs will be entered for the Plaintiffs, and the Defendants will be enjoined from further prosecution of the case entitled *parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court of Montgomery County, Alabama.

DONE this 15th day of June, 1983.

United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7395

First Alabama Bank Of Montgomery, N.A.,
and Edward Herbert,
Plaintiffs-Appellees,

versus

Parsons Steel, Inc., et al.,
Defendants,

A. Pope Gordon, Trustee in Bankruptcy for the Estate
of Parsons Steel Industries, Inc., Parsons Steel, Inc.,
Jim D. Parsons and Melba L. Parsons,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Alabama

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 4, 1984, 11th Cir., 198__, ____ F.2d ____).
(January 14, 1985)

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

PER CURIAM:

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this casue en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Homer Thornberry
United States Circuit Judge